

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DIANA L. MILLER

Plaintiff

V.

**STATE OF DELAWARE, and
DEPARTMENT OF PUBLIC SAFETY
AND HOMELAND SECURITY**

Defendants

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Submitted: May 10, 2010

Decided: July 16, 2010

MEMORANDUM OPINION

Upon Motion of Plaintiff to Compel -
DENIED, In Part, and GRANTED, In Part

Appearances:

Jeffrey K. Martin, Esquire, of Martin Associates, P.A., Wilmington, Delaware, attorney
for plaintiff

Jennifer D. Oliva, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, attorney for the defendants

HERLIHY, Judge

Plaintiff Diana Miller has moved to compel defendant (State of Delaware), Department of Public Safety and Homeland Security, to produce various Delaware State Police (“DSP”) records. Most of the documents she seeks, but not all, are DSP Internal Affairs (“IA”) records. The Department opposes production on the basis of certain statutory provisions.

To place this discovery dispute into context, some factual background is needed. Miller has sued the Department claiming (1) gender discrimination; (2) sexual harassment; and (3) retaliation. She has not joined any member of the DSP as a defendant, though she names several officers as the alleged perpetrators.

In her complaint, however, she makes allegations of improper sexual conduct primarily against two officers. She alleges improper sexual advances by a DSP Lieutenant Paul Taylor.¹ But most of the allegations of sexual misconduct and harassment are made against DSP Captain John Laird.² There was a DSP IA investigation of some of these allegations, apparently involving Capt. Laird, but who the complainant was and what the allegations were on that matter are unknown to the Court.

On April 27th the Court heard oral argument on Miller’s motion to compel the production of a number of documents including records relative to the IA proceeding. The Court denied Miller’s motion without prejudice but directed the parties to exchange

¹Compl. ¶¶ 4-11.

² *Id.* at ¶¶ 12-72.

further, more detailed, discussion concerning the items Miller seeks and why, and the Department's reasons for resisting production.

That exchange to some degree has narrowed the focus Miller's requests and why the Department opposes them. The only way to address what remains in dispute is to serially review each request. Before doing that, however, the Court must examine the primary reason for which the Department opposes Miller's motion, which are provisions in the Law-Enforcement Officers' Bill of Rights ("LEBOR").³

There are few authorities interpreting and applying these provisions, but what exists, nevertheless, is helpful. In the Court's view, the closest precedent to this case is *Bailey v. City of Wilmington*.⁴ In *Bailey*, a former Wilmington Police officer sued the City. The officer, Bailey, sought discovery of two items; (1) any arrest report of another Wilmington officer concerning the arrest of Wilmington Police Captain James Beirien, and, (2) any complaint filed with the City's Office of Professional Standards ("OPS") concerning Capt. Beirien relating to the arrest and detention of his son. Bailey argued these documents were relevant because; (1) Capt. Beirien presided over Bailey's termination hearing, and, (2) the officer who arrested Beirien's son was a key witness in Bailey's proceeding.

³ 11 *Del. C.* ch. 92.

⁴ 1997 WL 557555 (D. Del.).

The court in *Bailey* held since the arrest/crime report sought did not contain anyone's criminal record history, it had to be produced. The court, however, held that Bailey was not entitled to records of the OPS proceeding. The court based its ruling on this provision in the LEBOR statute:

(d) Unless otherwise required by this chapter, no law-enforcement agency shall be required to disclose in any civil proceeding, other than those brought by a citizen against a law-enforcement officer alleging that the officer breached the officer's official duties and that such breach resulted in injury or other damage to the citizen, any:

- (1) Personnel file; or
- (2) Internal affairs investigatory file compiled in connection with a law enforcement officer under investigation or subjected to questioning for any reason which could lead to disciplinary action, demotion, or dismissal.⁵

Since Capt. Beirien was not a named party, even though there was an implication of misconduct on his part in Bailey's complaint, Bailey was not entitled to the OPS records. *Bailey* and this case are analogous. Much of what Miller seeks relates to Capt. Laird and some to Lt. Taylor. Many paragraphs in her complaint, as noted, are allegations concerning alleged misconduct by Capt. Laird. As was the case in *Bailey* neither Capt. Laird nor Lt. Taylor is a named party.⁶

In another case, the United States District Court acknowledged the confidentiality provision of LEBOR, namely, 11 *Del. C.* §9200(c)(12) which reads:

⁵ 11 *Del. C.* § 9200(d).

⁶ *Bailey*, 1997 WL 557555, at *3.

All records compiled as a result of any investigation subject to the provisions of this chapter and/or a contractual disciplinary grievance procedure shall be and remain confidential and shall not be released to the public.⁷

Section 9200(c)(12) was raised in *Bailey*, but there was an issue of its applicability because it was added later to § 9200 and some of Capt. Beirien's alleged conduct may have pre-dated the addition. The court declined to get into the retroactivity issue of § 9200(c)(12) and relied instead on subsection (d).⁸ There is no such retroactivity issue here. Any "conduct," "documents," etc., would have occurred or been created after subsection (c)(12) was added to LEBOR. Both subsections, therefore, are implicated.

The Court notes that the confidentiality provisions such as are found in LEBOR, especially as to IA records, is not unique protection in Delaware law. For example, physician peer review records are exempt from discovery, even in a law suit *against the physician* who had been subject to such peer review.⁹ The protection in that provision, therefore, is more encompassing than in LEBOR because, unlike the exception in § 9200(d) where records can be obtained in a law suit against a named police officer, there is no such exception in the peer review statute.

Items Sought

With this statutory background and limited precedent, the Court will rule on each

⁷ *Conley v. Chaffinch*, 2005 WL 2678954 (D. Del.)(citing 11 *Del. C.* § 9200(d)).

⁸ *Bailey*, 1997 WL 557555, at *3.

⁹ 24 *Del. C.* § 1768(b).

of Miller's requests. Based on the exchange of the parties following the April 27th presentation of Miller's motion to compel, what she seeks appears to be winnowed "somewhat."

1. John Laird, Jr.'s personnel and Internal Affairs files.¹⁰

The Court concurs with the Department's position. Title 11, § 9200(c)(12) and (d) prohibit release of the documents which Miller seeks. Further, Capt. Laird is not a named party to her current action. The Department has provided certain information, namely that the Miller proceeding was Capt. Laird's only IA matter in his twenty-nine years of service, etc.¹¹

Based on that limited information and the statute, the Court denies Miller's motion on these items.

2. All written or electronic communications to plaintiff from Captain Laird, Stephanie Ballard, Blaine Quickel, Lieutenant Daniels and/or Tina Abbott.

Miller no longer seeks Ballard's records. She claims the others have some kind of knowledge of Capt. Laird's conduct toward her. The Department responds that it has repeatedly told Miller that no such electronic communications exist. It further notes that of these persons only Sgt. Quickel has been deposed and Miller never asked him about any

¹⁰ All subheadings are taken directly from Miller's April 30, 2010, letter requesting discovery.

¹¹ Dept.'s May 4, 2010, Resp. to Miller's Apr. 30, 2010, Letter ("Dept.'s May 4th Resp."), Exs. I, K.

such possible communications.

Based on the Department's representations and Miller's lackadaisical approach to discovery in this case, the Court sees no basis for granting the request.

3. Major Downes' Internal Affairs investigation and crime report in the years 2008-2009.

In paragraph 79 of her complaint, Miller, without naming a name or names, alleges various senior DSP officers were engaged in improper sexual affairs and that other senior officers condoned such conduct. Miller now argues in her submissions on the motion to compel that this officer was not only condoning sexual liaisons between DSP commanders, but also having such a relationship himself. She seeks to restrict her review of Major Downes' records only to those relating to Capt. Laird, but she makes no connection to her case.

The Department invokes the statutory shield. In an affidavit supplied with its response, it indicates that an IA investigation in 2008-09 involving Major Downes did not involve any inappropriate sexual relationship. Further it says the actual charge was found to be unsubstantiated and the IA investigation was unrelated to any charges of inappropriate sexual relationships¹²

Miller has deposed Major Downes. He denied knowing of any inappropriate relationship involving Capt. Laird and female employees at Troop 2.

¹² *Id.* at Ex. K. .

Miller has not shown why the Court should compel the Department to release any further records. Certainly any records encompassed within the statutory bar cannot be compelled.

4. All meeting notes between Capt. Laird, Cissy Laird (His Wife), John Laird, Jr., (his son; a DSP Trooper), and Tina Abbott (a DSP Trooper).

Miller claims all three individuals had knowledge of Capt. Laird's relationship with her. She claims any such notes would be probative. The Department responds that it has no such notes. Miller has supplied no evidence - testimony or otherwise - that such notes exist. The Court sees nothing to compel. As to this request, therefore, Miller's motion is denied.

5. All IA interview notes and statements of Troopers Tina Abbott and/or Suzanne Lowman(.) IA Interviews of each trooper occurred in early 2007.

Miller states that both troopers were interviewed about her relationships with other DSP Troopers. The Department invokes § 9200(d) as a bar to production of any records of such interviews. For the reasons cited earlier, that these officers are not parties to this action, and any records fall within the statutory bar Miller's motion on this request is denied.

6. All documents relating to any complaints or charges against Capt. Laird by anyone at DSP, including, but not limited to, Plaintiff, Theresa Schneiderwent and Cathy Prouse.

Miller's contention here is that, Schneiderwent acknowledged a relationship with Capt. Laird and she wants to know of any consequences to him stemming from it. Prouse,

Miller says, has been the subject of DSP scuttlebutt concerning a relationship with Capt. Laird though she denied such when Miller deposed her.

The Department's response is that there are no such documents in Capt. Laird's personnel file or in the IA file. Further, there is no documentation of any complaints against him by any (other) DSP female employee.¹³ Both females named in this request, when deposed, denied any such relationship. Miller has provided no evidence that these documents exist, and therefore, the Court sees nothing to compel.

7. All documents relating to the IA investigation of Sgt. Blaine Quickel.

The reason offered for this request is that Sgt. Quickel had some kind of relationship with Miller. She says she spoke to him about Capt. Laird's alleged conduct toward her. She claims portions of an IA investigation, apparently about Sgt. Quickel, were leaked to Capt. Laird. She now limits this request to those portions of this investigation to anything involving Capt. Laird's conduct with female subordinates and any reference to her and Capt. Laird. The Department invokes § 9200(d). The Court finds that invocation appropriate and cannot, therefore, grant this part of Miller's motion.

8. All documents relating to and [sic] IA or HR interviews with Dawn Haass and Sgt. Ben Nefosky from 2006 to present relating to Plaintiff. Dawn Hass was a DSP civilian employee who worked in the same troop as Plaintiff.

Miller's assertion here is that Haass had issues with how Capt. Laird treated her (Haass) and made many comments to her about his treatment of Miller. Sgt. Nefosky, she

¹³ *Id.*

claims was best friends with Lt. Mark Daniels (who appears to have been part of the IA investigation of Capt. Laird) and worked with him to develop unfavorable information on Miller.

Here, too, the Department interposes § 9200(d) as a bar to the request. It, however, previously produced Haass' HR statement. Presumably that statement is all that there is in Haass' file; if not, the Department shall deliver to Miller any other HR statements Haass gave. Nefrosky, it says, was never interviewed by HR or IA in regard to Miller's complaint against Capt. Laird.¹⁴

The Court sees no basis to compel anything more. Neither of these individuals are defendants in this case and § 9200(d) applies.

9. All notes/interviews by HR in April, May 2007 involving Plaintiff, Dawn Haass, Pamela Coupe, Joann Austin, Capt. Laird, Sgt. Paul Taylor and/or Sgt. Donna Simpson.

Miller lists specific dates of interviews of all of these individuals. She says all were interviewed at Troop 2 and that the subject matter concerned her and Capt. Laird.

The Department indicates that it has given to Miller the HR interviews of Coupe, Smith, Haass, Simpson and Austin. This was done despite § 9200(d). The Court views the Department's action as a waiver of one bar under that section. If, therefore, there are any more documents reflecting such interviews, the Department is obligated to give them to Miller, including any notes.

¹⁴ *Id.*

10. IA interview tapes of anyone with knowledge of the relationship between Capt. Laird and Plaintiff.

Miller argues that the Department should have long ago produced these tapes or at least, have prepared a privilege log concerning them. On that latter point, Miller is correct.

The Department raises LEBOR again. But it also reports that it has produced “the single investigation regarding the allegations made by Ms. Miller. . . .”¹⁵ Miller correctly replies that this is an unclear response and questions whether what was produced was a copy of Miller’s own complaint. The disconnect between the Department’s response and Miller’s follow-up needs to be addressed. The Court urges the parties to first try to straighten it out but to notify the Court if they cannot.

11. IA interview Tapes of Cpl. Lisa Tons-Rockmill [sic] from July 2006 and 2007.

Miller has agreed to limit this request to Capt. Laird’s treatment of his female subordinates, particularly Miller. Even with that limitation, the Department raises the LEBOR bar. It is applicable. In addition, the Department says there are no such IA interview tapes.¹⁶

12. IA interview tapes of Lt. Paul Taylor with regard to discrimination allegations against Plaintiff.

Miller refers back to paragraphs 4-11 of her complaint as her primary reason for

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 13, Ex. K. .

seeking any such tapes. She also states, that when deposed, she observed a document in front of Lt. Taylor which she believes reflects the existence of such tapes.

The Court is unclear about the Department's response. Based on Miller's complaint in this matter, it appears she never made a complaint within DSP about any conduct by Lt. Taylor involving her. In her April 30th letter to the Court, Miller says, "As this was recorded . . ." ¹⁷ Was there a complaint about him made within DSP, whether up the chain of command to HR or IA?

If Miller so complained, she is entitled to a copy. If she did not, at this point, it appears LEBOR bars production of other records. If the parties wish to clarify this particular issue, they may do so. Otherwise, the Court sees nothing to be produced except as noted.

13. All written or electronic communications from or to Pamela Coupe and/or Joann Austin with regard to Plaintiff.

Here again, the parties are not on the same page. The Department reports it informed Miller on four occasions that no such communications exist. It also notes Miller has not deposed either person.

Miller, in her May 10th letter to the Court, indicates that in March, the Department produced a document which purports to be Coupe's communication to DSP HR about Miller. The Court cannot say whether that is so and/or whether it constitutes a waiver of

¹⁷ Miller's Apr. 30, 2010, Letter at 3.

any privilege the Department invokes.

On this basis, the Court cannot grant or deny Miller's motion to compel.

There remains one potential complicating issue. It is that some of the persons named appear to be or were DSP *civilian* employees. They would not, therefore, be law enforcement persons within the meaning of LEBOR.¹⁸ Some of the documents or things sought may not have become part of an officer's HR or IA file and if they did not, they could be discoverable. While the Court candidly believes they became part of the HR File or IA file (or files) of Capt. Laird, the Court has to keep open the possibility they did not.

Accordingly, the parties are to notify me of their positions on this issue by July 30, 2010.

Conclusion

For the reasons stated herein, plaintiff Diana Miller's motion to compel is **DENIED, in part, and GRANTED, in part.**

IT IS SO ORDERED.

J.

¹⁸ 11 Del. C. § 9200(b).